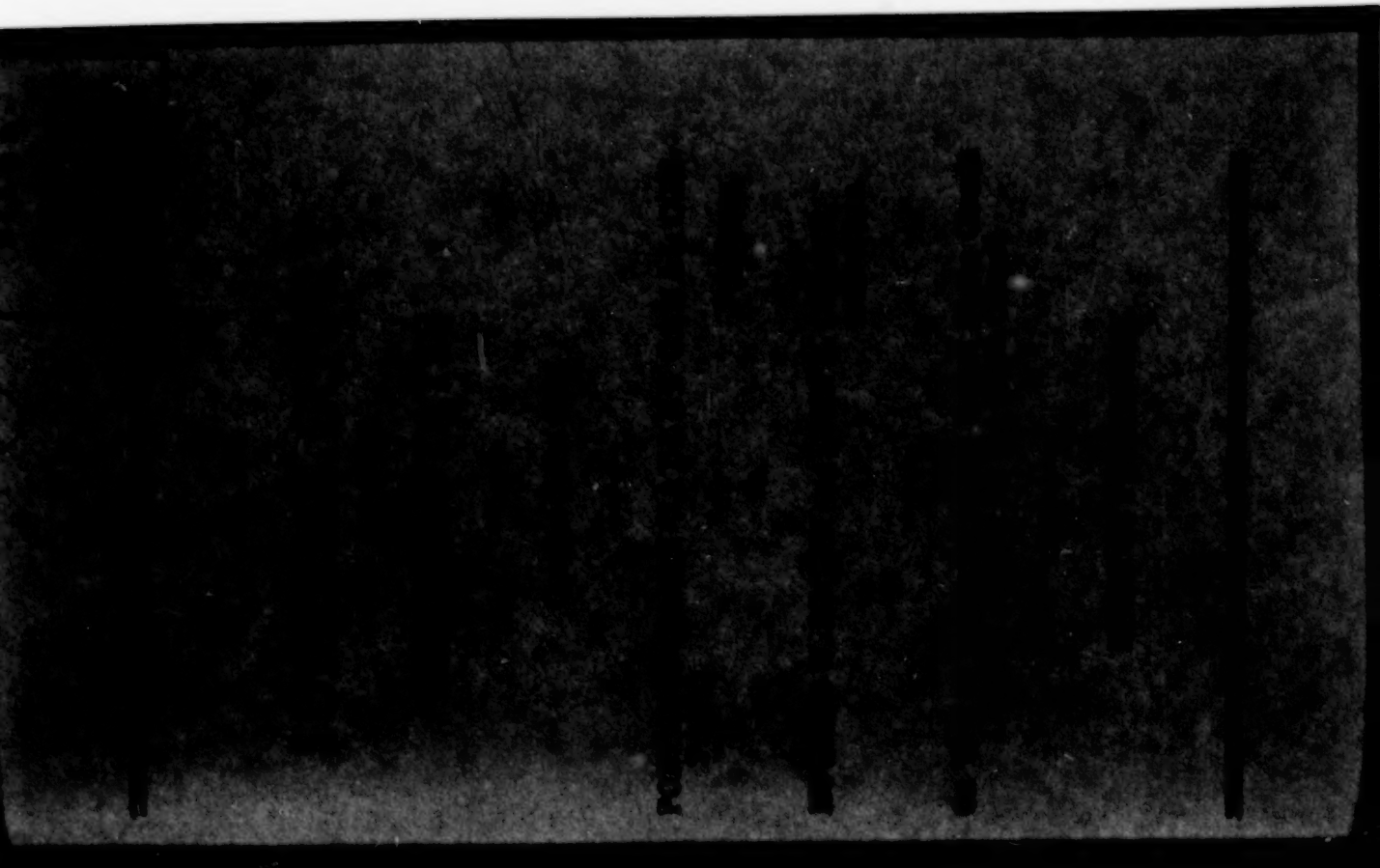

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No. 252.

SUPREME COURT
OF THE
UNITED STATES

October Term 1926.

PORTNEUF-MARSH VALLEY CANAL COMPANY,

Petitioner,

vs.

HOWARD W. BROWN and JOHN R. CHAPIN, as Trustees.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF PETITIONER

No. 252.

SUPREME COURT
OF THE
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October Term 1926.

PORTNEUF-MARSH VALLEY CANAL COMPANY,

Petitioner,

vs.

HOWARD W. BROWN and JOHN R. CHAPIN, as Trustees.

BRIEF OF PETITIONER.

The writ has been granted by this court to review the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of Brown v. Portneuf-Marsh Valley Irrigation Company, 5 Fed. (2nd) 895. The opinion of the Circuit Court of Appeals appears in the record beginning at page 350, and the decree of that court is at page 358. The decree of the Circuit Court of Appeals reversed the District Court for the District of Idaho on the only issue here involved, the opinion of which latter court is reported in 299 Fed. 338. (R. 295-314) The decree of the District Court for the District of Idaho appears in the record at pages 315-344. The particular portion of the decree of the District Court in Idaho which is in issue here is paragraph six at pages 337-339 of the record.

JURISDICTION OF THIS COURT.

The writ of certiorari has been granted by this court under the provisions of Section 240 of the Judicial Code (U. S. C. 347).

STATEMENT OF THE CASE.

Howard R. Brown and John R. Chapin as trustees instituted this action in the District Court of the United States for the District of Idaho, Eastern Division, to foreclose a deed of trust upon an irrigation system and its appurtenant water rights and properties in Bannock County, Idaho. Decree of the trial court was entered June 26th, 1924, (R. 315) by which foreclosure was ordered as sought by the trustees, with the provision in the decree, however, that the defendant, who is the petitioner here, Portneuf-Marsh Valley Canal Company, had a lien paramount to the lien of the trustees on some 5495.2 shares of stock of the Portneuf-Marsh Valley Canal Company, the petitioner, which owned the irrigation system and water rights. (R. 337) The claim of the Portneuf-Marsh Valley Canal Company which was thus granted priority, amounted, at the date of the decree, to $89,417.64, and represented unpaid assessments levied against the stock for maintenance and operation of the irrigation system, together with interest on such amounts.

The trustees, Brown and Chapin, prosecuted an appeal to the Circuit Court of Appeals for the Ninth Circuit from the portion of the lower court's decree establishing this priority of lien, and it was

upon this issue that the Circuit Court of Appeals reversed the lower court. To clarify the issue, a brief summary of the framework which has been erected to carry out the purposes of the so-called Carey Act (Act of Congress of Aug. 18th, 1894, 28 State. at Large, 372, 422, and amendments thereto) is necessary.

The Carey Act, in effect, provides that whenever it is deemed feasible to provide for the irrigation, by artificial means, of otherwise arid land in the Western states, the respective states may request of the Interior Department of the United States the withdrawal of certain specified areas from entry under the public land laws, and that after the Interior Department has made the order of withdrawal the states may provide for the irrigation of the lands included in such areas and that sales of the land can be made only to purchasers of water under the system which is to be constructed, the land itself to be sold at such a price as to make the water the real consideration for the purchase. The Carey Act also provides that, contrary to the law as it otherwise existed, liens may be created upon the land, prior to issuance of patent, for the cost of constructing the water works and distributing systems.

In making available these privileges, it has usually followed that a company of promoters has "discovered" the feasibility of some irrigation project which combined the two features of, *first*, sufficient unappropriated public land in a contiguous body to justify the building of an irrigation system, and, *second*,

an available supply of unappropriated water which, at what appears to be a justifiable cost, can be delivered upon the land in question.

The "discovery" having been made, the promoters take the matter up with the administrative board of the State in which the land is located, which has charge of such matters. The board is persuaded to petition the United States, through the Interior Department, for a withdrawal of the lands from entry. Simultaneously with thus petitioning the board, or prior thereto, the promoters file upon the water which is to be used to irrigate the tract and obtain a permit for its appropriation under the State laws. The permit contains provisions for the construction of the works over such a period as makes it possible to comply therewith at the same time that the provisions of the Carey Act with relation to the bringing of the land under irrigation are being complied with.

The order of withdrawal is next made by the Department of the Interior, and thereupon the State enters into a contract with the United States whereby the United States agrees to issue patent to the State to the land in question upon the making of certain proof in the future showing that the water is available for each tract of land in the area in question, and that the system has been built to place the water on the land. The contract between the United States and the State also provides that the land will be sold at the price of fifty cents per acre to entrymen qualifying to carry out the purposes of the Act, and who at the same time purchase

from the builders of the irrigation system the water that is to be applied to the land.

Immediately upon the contract between the State and the United States of America being entered into, the promoters enter into a contract with the State by which the promoters agree to build the irrigation system and supply water to the land, and by which the promoters are given the exclusive right to sell water within the project. It is therein provided that entries thereunder will be restricted to purchasers of water.

The motives of the promoters, admirable though their purposes may be, are not altruistic. The measure of their contemplated profits is the difference between the actual cost of constructing the system and the total amount at which water can be sold to the settlers. While a limit is placed upon such a profit by the State in its contract with the promoters, in that it fixes the maximum amount at which water rights can be sold and the maximum amount of water that can be sold, it is, nevertheless, true that a very substantial margin exists, and must exist, between the contemplated cost of constructing the system and the amount to be realized from sales of water

Ordinarily the promoters are individuals, and as soon as their contract with the State has been entered into, all their rights under the contract, as well as their permit to appropriate water under the laws of the State, are transferred to a com-

pany which they form for the purpose of constructing the system.

The company which is formed for this purpose is also the company which has the authority to sell water rights to settlers. This situation of itself provides the means by which finances are obtained to construct the system. The land is thrown open to entry, and the settlers who colonize it each enter into a contract with the construction company to purchase water at a specified price per acre, with a payment down and the balance in annual installments extending over a period of years, and at the same time the settlers make entry upon the land itself through the state administrative board having charge of it. The construction company is then in a position to hypothecate as security the contracts of the settlers, all of which contracts provide for security for the unpaid installments of the contract price in some particular form. The construction company, thereupon, by the use of such contracts as security, issues bonds in an amount sufficient to construct the system.

As the system for the conveyance of water, including the water rights, is ultimately to belong to the settlers themselves, and the respective water rights are to be made appurtenant to the respective parcels of land within the project, it is apparent that a means must be provided whereby upon completion of the system and payment by the settlers of the purchase price of their various water rights, the irrigation system, as an entity, will be turned over to the settlers and ownership of the system, that is,

the water rights, the diversion and distributing works, and any storage facilities, be vested in the settlers.

For the purpose of facilitating this last mentioned transfer it is usually provided in the original contract between the promoters and the State that a corporation shall be formed to act as the "operating" company. As and when land is entered on such a project by a settler and a contract is signed between the settler and the construction company for the purchase of water and the payment therefor either in cash or in installments, the settler is also issued his proportionate amount of stock in the operating company. The stock is usually placed with the construction company as additional security for the payment of the balance due on the settlers' contracts with the construction company or placed in escrow to be delivered upon the payment by the settler of the amount due on his contract for the purchase of water, or some specified percentage thereof. In working out it necessarily follows that as the settler pays for his water, his stock in the operating company is delivered to him.

The contract between the promoters and the State in the first instance, provides that the title to the irrigation system and water rights shall be by the construction company actually vested in the operating company, to the end that the stock issued to the settlers, or for the issuance of which provision is made, shall actually carry with it a proportionate ownership in the physical works themselves and in the water rights of the construction company.

The construction company in obtaining funds necessary to build the system pledges the various contracts which it has with settlers, all of which contracts, as stated, are secured by the water and the land of the settler, and makes such provision in the trust deed with respect to the stock in the operating company so as to protect the pledges of the contracts therein.

Where the conditions are ideal at the inception of such an undertaking and remain ideal throughout, matters such as the present case presents do not arise. There are present, unfortunately, all the elements which experience has taught us lead to difficulties in promotions. However careful the promoters may have been, they invariably encounter unexpected difficulties in construction of the system. These lead to increased cost and delays in the delivery of water. It is generally discovered that the water supply itself is insufficient or that transit and evaporation losses between the point of diversion and the point of application to the land are greater than were anticipated. These lead to inadequate water deliveries to the various settlers and the consequent failure of the crops of the settlers. Difficulties are encountered in colonization, and the settlers themselves are unable to place their land in shape for cultivation within the time contemplated in their contracts, with the result that income from the land of the settler is delayed. All, or part, of these causes, together with bad crop years, or failure, on the part of the settlers to provide themselves with a sufficient sum of money at the outset to keep the payments on their contracts up, lead to de-

faults on the part of the settlers. The payments are not made in accordance with their contracts, and since the times of payments on their contracts generally bear a very close relationship to the maturing obligations of the construction company, the defaults of the settlers lead to defaults by the construction company in the payment of interest or principal on the bonds.

During the period of construction of the canal and for a few years thereafter discontent among the settlers on the project grows, and it is ordinarily necessary to reorganize the entire project sometime later. In the reorganization the holders of the bonds, scured by the trust deed, who have a direct lien upon all the contracts of the settlers and the water stock in the operating company, are necessary and important parties, and in fact are generally the parties at whose instance reorganization takes place. The reorganization will ordinarily result in a cutting down of the acreage of the land to be irrigated and a corresponding cut in the amount of water which can be sold. Provision is also made for deferring of the payments due from the settlers for the water. When reorganization takes place, the net result is a loss of ultimate profits to the promoters, as ordinarily the project is still able on the original basis to provide sufficient funds to retire the bonds.

The foregoing, in a very general way, outlines the relationship of the various parties who are concerned here. The petitioner, the Portneuf-Marsh

Valley Canal Company, is the "operating" company. The Portneuf-Marsh Valley Irrigation Company which was a party to the original action, is the "construction" company.

In the instant case, the contract between the State of Idaho and the United States of America for the withdrawal of lands within the Portneuf-Marsh Valley Irrigation project was made on May 14th, 1908. (R. 38) The promoters of the project were H. O. Harkness and others, and they entered into their contract with the State of Idaho June 3rd, 1908. (R. 38) The promoters of the project duly assigned their rights to the Portneuf-Marsh Valley Irrigation Company shortly thereafter. (R. 38) In the contract which the promoters had with the State of Idaho it was provided (R. 259):

> "Transfer of Possession and Management of Canal. It being necessary to provide a convenient method of transferring the ownership and control of said canal and irrigation works from the said party of the second part and for determining their rights among themselves and between said purchasers and the party of the second part herein and for the purpose of operation and maintaining said canal during the period of construction and afterwards and for the purpose of levying and collecting tolls, charges and assessments for managing said canal and for the management and operation thereof it is hereby provided that as soon as said lands are ordered thrown open for settlement, a corporation to be known as the Portneuf-Marsh Valley (*Canal*) Company, Limited, shall be formed at the expense of the party of the second part, the Articles

of Incorporation of said company, to be approved by the Attorney General of the State of Idaho; that the authorized capital of said corporation shall be twenty thousand (20,000) shares, which amount is intended to represent one share for each acre of land which may hereafter be irrigated from said canal. All persons, who prior to the formation of such corporation, have purchased or acquired water rights of water from said second party for the irrigation of lands embraced in this contract and being then the owners of such rights or shares, shall be entitled to receive and have issued to them, shares in such corporation so to be formed, equal in number to the water rights or shares of water then owned and held by such persons and the remainder of the capital stock of such corporation shall be issued to the party of the second part in consideration of the covenants and agreements herein contained in order to enable it to deliver to purchasers of water rights the shares of stock representing the same. Said shares of stock, however, shall have no voting power and shall be without force or effect until they have been sold or contracted to be sold to the purchasers of land under said irrigation works.

At the time of the purchase of any water right after the formation of said corporation, there shall be issued to the purchaser thereof, one share of capital stock of said corporation for each acre of land entered or filed upon. That the said party of the second part herein shall, in case said water rights or shares of stock are not fully paid for, require the endorsement and delivery to it of said stock and shall at the same time require of said purchaser an agreement that until thirty-five per cent

(35%) of the purchase price of said stock has been paid, the said party of the second part therein shall vote said stock in such manner as it may deem proper at all meetings of the stockholders of said corporation.

But the said second party hereto, nor the said Portneuf-Marsh Valley Canal Company, Limited, cannot in any manner control any of the said system so as to limit the liability of the second party under the terms of this contract.

The said Portneuf-Marsh Valley Canal Company, Limited, shall have the management, ownership and control, as above set out, of said irrigation system as fast as the same is completed and turned over to it for operation by the said party of the second part, as hereinafter provided. Whenever it is certified by the Chief Engineer of the Company and the State Engineer of Idaho, that certain portions of the said irrigation works have been so far completed as to permit the operation thereof for delivery of water to purchasers of water rights, the same may, with the consent of the State Land Board, be transferred and turned over to the said Portneuf-Marsh Valley Canal Company, Limited, for operation. Such transfer and operation, however, shall not in any manner lessen the responsibility of the said second party with reference to the terms of this contract nor shall such consent upon the part of the State Land Board be construed as a final acceptance of such portion of such canal, it being always understood that the acceptance of said irrigation system must be in its entirety, and that the bond given for the faithful performance of said contract must be made and be liable for

the substantial completion of the entire irrigation system." (R. 259-261)

The following provision is also found in this contract:

"Existing Laws Part of Contract.

"It is hereby understood and expressly agreed that this contract is made and entered into by virtue of the provisions and subject to all of the conditions of an Act of Congress, commonly known as the 'Carey Act', approved August 18, 1894, and the acts amendatory thereto and the laws of the State of Idaho, accepting the terms and provisions of the said 'Carey Act', and the contract between the United States, and the State of Idaho, segregating fro mthe public domain the lands herein designated as Carey Act Lands, and that such laws and contract are as much a part of this contract as if specifically herein set forth." (R. 265-266)

The Articles of Incorporation of the Portneuf-Marsh Valley Canal Company appear in the record beginning at page 274, and among the purposes for which it is formed we find the following:

"(a) To provide a convenient method of transferring the ownership and control of the dams, reservoir, canals, irrigation system and all rights, franchises and privileges pertaining thereto and connected therewith, constructed or to be constructed by said Portneuf-Marsh Valley Irrigation Company, Limited, pursuant to said agreement of June 3, 1908, as the same shall be completed and turned over by said Portneuf-Marsh Valley Irrigation Company,

Limited, to this corporation, representing and comprising the purchasers of shares and water rights in said irrigation system; to determine the rights of said purchasers of said shares and water rights as between themselves and between said purchasers and the said Portneuf-Marsh Valley Irrigation Company, Limited; to operate and maintain said irrigation system and works as the same shall be completed and turned over to it during the period of construction and subsequent thereto; to levy and collect tolls, charges and assessments for the carrying on and maintaining of said irrigation system and management and operation thereof.

(c) When and as such irrigation system may be turned over to it by the Portneuf-Marsh Valley Irrigation Company, Limited, for operation, to distribute the waters diverted by and a part of the said irrigation system and to which this company may be entitled, among the stockholders thereof; to maintain, operate and keep in repair said irrigation system; to fix, charge and collect from its stockholders and all users of water from its said irrigation system, tolls, rentals, assessments and maintenance charges based upon the number of shares of stock held by each person or proportioned to the amount of water used, or owned, or the number of acres irrigated by each person or by any one or more or by all of such methods, and to impose and collect fines and penalties for the failure of its stockholders or water users to pay the tolls, rentals, assessments or maintenance charges when the same become due." (R. 275-276)

The By-Laws of the Portneuf-Marsh Valley Canal

Company which were adopted on September 18th, 1908, (R. 289) provide:

"Article V.—Stock.

"Section 1. Stock Appurtenant to Land.—The Certificates for shares of the capital stock of the Company shall be in such form not inconsistent with these by-laws or the Certificate of Incorpration, or shall be prepared and approved by the Board of Directors. They shall be signed by the President, or, in his absence, by the Vice-President, and also by the Secretary, and sealed with the corporate seal. The records of the Company and each and every certificate of stock issued, under which water shall be delivered for the irrigation of land, shall contain a description of the lands to be irrigated and to which such shares and water rights shall be perpetually appurtenant, and thereafter such shares and water rights shall forever be dedicated and inseparably appurtenant to such lands, unless such shares of stock and the rights and interest created thereunder or accruing by reason of the ownership thereof shall become forfeited through a failure of the owner or holder thereof to pay assessments against such stock or for the use of water thereunder from such canal, or unless such stock shall be forfeited or sold by operation of law, or shall become forfeited under the provisions of these by-laws for failure of the holder thereof to comply with such by-laws and the rules and regulations of the Company.

Sec. 2. Transfer of Title.—Every transfer of the title to any lands to which the said rights and shares are appurtenant, whether by grant or by operation of law (except where the lands

may be subjected by grant, or involuntarily under any law, to an easement, the exercise of which does not interfere with the cultivation of the soil by the servient owner) shall operate, whether to be expressed therein or not, as a transfer to the grantee or successor in title, of all rights to the use of water for the irrigation of said lands, also all rights arising from, or incident to, the ownership of such shares, as well as the shares themselves; and upon presentation to this company of proof of any such transfer of land, the proper officer shall transfer such shares of stock upon the books of the successor in title to said lands.

Sec. 3. Transfer of Shares.—Any transfer or attempted transfer of any of the shares of this Company, made or suffered by the owners thereof, unless simultaneously a transfer of the land to which it is appurtenant is made or suffered in favor of the same party, shall be of no force or effect for any purpose, and shall confer no rights of any kind whatever on the person or persons to whom such transfer may have been attempted to be made.

Sec. 5. Expense of Maintenance.—For the purpose of defraying the expenses of the Company of whatsoever kind and paying the cost for maintaining, managing and operating said canal system, the Board of Directors of the Company are authorized and directed to levy such tax or taxes, charge or charges, assessment or assessments, as in the judgment of said Board may appear necessary or proper to raise the money or revenue required. All such expenses, taxes, costs and charges to be apportioned among all the stock issued by the Company, which has been applied and made ap-

purtenant to land, but no such assessment or tax shall be levied against shares which have been issued to or are held for the benefit or in the interest of The Portneuf-Marsh Valley Irrigation Company, Limited, and which has not ben sold or made appurtenant to land.

The taxes or assessments herein provided for, shall be levied against the owners of the shares of stock applied or made appurtenant to land, regardless of whether water has been used for irrigation purposes by the holder of said stock.

Sec. 8. Shares Held Subject to Rights of the Portneuf-Marsh Valley Irrigation Company, Limited.—All shares in this corporation shall be held subject to the rights of the Portneuf-Marsh Valley Irrigation Company, Limited, until the amount due such Company, its successors or assigns, shall have been fully and finally paid, as provided in the contract between said corporation and the purchaser of shares and as provided in the contract between the Portneuf-Marsh Valley Irrigation Company, Limited, and the State of Idaho.

Sec. 9. Default in Payments.—Upon this Company being notified under oath by the Portneuf-Marsh Valley Irrigation Company, Limited, its successors or assigns, that any stockholder in this corporation has defaulted in his payments, or any of them to be made under his contract of purchase of water right, pursuant to which stock in this Company was issued, no water from the canal of this Company, or any of its laterals, shall be delivered to such stockholder or for the use or benefits of the land described in such stock certificate,

until the amount so due The Portneuf-Marsh Valley Irrigation Company, Limited, its successors or assigns, has been fully paid or otherwise adjusted to the satisfaction of such Company, its successors or assigns." (R. 284-287)

Plaintiff's Exhibit C-1 appearing in the record at pages 125 to 131, is the form of water contract entered into between the Portneuf-Marsh Valley Irrigation Company and the various settlers and is the form used by the company up to the time that the irrigation project was turned over to the settlers. (R. 90-91) Reference is made here to the following from the contract form between the Portneuf-Marsh Valley Irrigation Company and the settlers:

"2. The Company agrees that so long as it retains control of the Portneuf-Marsh Valley Canal Company, Limited, to-wit, so long as it shall continue to vote a majority of the stock of said Company, as provided by the State contract, that it will cause said Company to keep and maintain the said irrigation system in good order and condition and to cause any necessary repairs thereto to be made as soon as practicable and expedient.

Said Portneuf-Marsh Valley Canal Company, Limited, is to have power to levy all necessary tolls, charges and assessments upon all users of water in proportion to their respective holding of stock, whether water is used or not and the Company hereby agrees that no charges shall be made for the delivery of water from this date until after the first day of April, 1909, and then only if the water from their reservoir

and irrigation system is available for delivery, and that thereafter the annual charge for maintenance shall not, while the Company is in control of the said Portneuf-Marsh Valley Canal Company, Limited, exceed the sum of 50 cents for each and every acre to be charged against the entire acreage entered irrespective of the irrigation thereof. The purchaser agrees to pay said charges in advance at the office of the Portneuf-Marsh Valley Canal Company, Limited, on the first day of April of each year without notice." (R. 127)

"And the purchaser hereby further covenants that he will and by these presents does hereby grant, assign, transfer and set over by way of mortgage or pledge to the Company to secure the payments of the amounts due and to become due on the purchase price of the shares of stock hereby purchased, any and all interest, and all rights which he now has or which may hereafter accrue to him under his contract with the State of Idaho, for the purchase of the lands to which the water rights hereby purchased are dedicated, and further that immediately upon transfer to him of the legal title to said lands or any part thereof, he will, upon demand, execute in proper form, a mortgage or deed of trust with power of sale in such form as may be approved by the State Board of Land Commissioners to secure the payments herein provided for, which said mortgage the purchaser hereby covenants and agrees shall be a first lien upon the lands so mortgaged, superior to any and every incumbrance in favor of any persons whomsoever.

5. The purchaser agrees that to further se-

> cure said payments the shares of stock purchased in the Portneuf-Marsh Valley Canal Company, Limited, shall be and they are hereby assigned and transferred to the Company with power to pledge the same and said Company and its agents and assigns are hereby authorized and empowered to vote said stock in such manner as it or they may deem proper at all meetings of the stockholders of said Company until 35 per cent of the purchase price of said stock has been paid." (R. 129-130)

The trust deed for the foreclosure of which this action was brought is attached to the bill of complaint as Exhibit "A". (R. 25-55) It was received in evidence as Plaintiff's Exhibit "A". (R. 90-111).

The trust deed mortgaged all of the physical properties owned by the Portneuf-Marsh Valley Irrigation Company as a part of the system itself. This covered rights-of-way, reservoir, water rights and appropriations, etc. (R. 32-37) It also included the water contracts of the various settlers in the following terms: (R. 37)

> "Also such water contracts and notes secured by mortgage or trust deed and such bills receivable owing to the Company and money now owned or hereinafter acquired and such personal property of whatsoever nature or description now owned or hereafter acquired by the Company as shall be lodged with the Trustees under the provisions hereof."

The trust deed also provided (R. 38)

> "Article I. So long as no default shall be made in the payment of the principal or the

interest of the said bonds according to their tenor and effect, and so long as the condition of this deed shall be performed the Company shall be entitled to receive its incomes and profits; and may sell, and may exchange for other property, free of the lien hereof, water and water rights to bona fide purchasers thereof and receive and collect the proceeds of such sales and trades precisely as if this mortgage had not been made."

The trust deed also contained the following provision: (R. 39-40)

"Article III. Before any bonds shall be issued under this instrument there shall be pledged hereunder with Colonial Trust & Savings Bank, one of the Trustees, water contracts owned by the Company or notes secured by mortgage or deed of trust upon land and water rights thereunto attached (hereinafter called 'notes') or cash money, or partly water contracts, and partly secured notes or cash moneys, aggregating at par one and one-half (1½) times the par value of the installment of bonds of this issue then demanded by the Company and issued by the said Trustee hereunder. But the said Trustee shall require the opinion of counsel, selected by it and paid by the Company, to the effect that said water contracts (if water contracts are so deposited) are and constitute direct liens upon real estate capable of being irrigated from the irrigation system of the Company; or that said notes (if notes are so deposited) are amply secured by mortgages or trust deeds which are direct liens upon real estate capable of being irrigated from the irrigation system of the Company to which lands have been attached water

rights sufficient to irrigate them; and both such land and water shall be subjected to the lien of such mortgage or deed of trust.

The Company further covenants and agrees that the par value of the aggregate of the secured notes and water contracts, which it shall from time to time assign to and deposit with the said Trustee for the purpose of securing and of paying the principal and interest of the bonds issued and to be issued hereunder shall always equal one hundred and fifty per cent (150%) of the par value of the outstanding bonds, less the actual cash then in the hands of the said Trustee applicable to the payment of any matured bond or bonds properly called for redemption prior to maturity as herein provided. The said secured notes and water contracts so deposited with the said Trustee shall by the Company be duly assigned to the Trustees by a good and proper written assignment, and the said mortgages, or trust deeds and water contracts shall be duly assigned by the Company and recorded in the proper county. And the said Trustee shall on behalf of the holders of the bonds secured hereby collect, and if it deems it best to do so, enforce the collection of such secured notes, and water contracts, and shall apply the proceeds of such collection to the equal pro rate payment of the bonds and coupons hereby secured, paying all overdue coupons first. And the Trustees shall, upon demand, and after the payment of such secured note or notes or water contract or contracts, make, execute and deliver a full and complete release and satisfaction of the lien thereof to such purchaser, for each of which they shall be entitled to charge, and the Company shall pay, a fee of Two Dollars.

> By 'Water Contract', as the same is used in this instrument, is meant a contract for water to be delivered from the company's water supply and to be attached to a specific tract of land, and securing, by way of mortgage lien upon both land and water, the purchase price of said water until such purchase price shall be fully paid.
>
> By 'Note' as the same is used in this instrument is meant a note given to the Company in payment or part payment of the purchase price of water to be delivered from the Company's water supply and secured by mortgage or deed of trust both upon said water and upon the land to which the water is attached."

Following the usual history of Carey Act promotions, difficulties were encountered by the construction company in the completion of the irrigation system. It being necessary for the State of Idaho to accept the system as completed before the construction company could be relieved of liability on its contract with the State, and this also being a condition precedent to the obtaining of patent to the lands by the State from the Federal Government, after much negotiation a reorganization took place in 1915.

On March 25th, 1915, the construction company, namely, the Portneuf-Marsh Valley Irrigation Company, and the operating company, namely, the Portneuf-Marsh Valley Canal Company, the petitioner here, joined in a petition to the State Board of Land Commissioners to accept the system as completed, to exonerate the bond of the Portneuf-Marsh

Valley Irrigation Company given by it to insure the faithful performance of its contract with the State of Idaho, and to authorize the turning over of the system to the Portneuf-Marsh Valley Canal Company. (Plaintiff's Exhibit I, R. 150) This petition was joined in by practically all the indivdual water contract holders on the project, as will appear from Exhibit "B" to Plaintiff's Exhibit I, beginning at page 160 of the record.

As a part of the adjustment thus made, a new contract was entered into between the Portneuf-Marsh Valley Irrigation Company, the construction company, and the Portneuf-Marsh Valley Canal Company, the operating company. This contract is set forth as Exhibit "A" to Plaintiff's Exhibit I. (R. 151)

By this contract, among other things, it was provided, that the stock of the Portneuf-Marsh Valley Canal Company should be reduced from 20,000 to 14,000 shares, thus reducing the area of the land for which water could be sold from the system as constructed, from 20,000 to 14,000 acres. Other provisions in this contract of adjustment are not of any peculiar materiality to the decision of the question which is here presented.

Pursuant to the adjustment as made, the State Board of Land Commissioners of the State of Idaho, adopted the recommendations of the interested parties and entered its order accepting the irrigation system constructed and discharging the construction company from further liability under

its contract of June 3rd, 1908, with the State of Idaho, and exonerating its bond. (Plaintiff's Exhibit "J", R. 162-163) Thereafter, the Portneuf-Marsh Valley Irrigation Company, the construction company, entered into new contracts with the settlers, or such of the settlers as were willing to sign the new contracts, which new contracts were in the form of Plaintiff's Exhibit "C-2", appearing in the record at pages 133 to 137. These new contracts were very similar to the contracts entered into in 1908, and provided that the settlers should secure the unpaid balance due upon their contracts for the purchase of water by a trust deed, or mortgage, upon their land and water, and also that for the purpose of further securing such payments, the shares of stock which the settler held in the Portneuf-Marsh Valley Canal Company should be assigned and transferred to the construction company with power in the construction company to pledge the same. (R. 135)

Subsequent to the adjustment, made as aforesaid, the trustees under the bond issue from time to time brought proceedings to foreclose the lien of some of the water contracts of the settlers. (R. 91) In none of these actions was the Portneuf-Marsh Valley Canal Company made a party. It was, therefore, stipulated at the trial of the cause that the Portneuf-Marsh Valley Canal Company remained unaffected by any decrees of foreclosure in the State court of Idaho on any such individual water contracts. (R. 92) The form of sheriff's deeds taken by the trustees in such instances is set forth as Plaintiff's

Exhibit "D-1", (R. 141-144) and the list of sheriff's deeds with the description of the land involved, stock certificate number in the Portneuf-Marsh Valley Canal Company, and number of shares of stock in that company, is set forth at page 140 of the record.

The trustees also in several instances, where defaults had occurred under the water contracts of the respective settlers, contracted with the settlers and for a small payment down obtained quit claim deeds. (R. 95) Plaintiff's Exhibit "E" at page 144 of the record contains a list of the quit claim deeds thus taken, the list including, in addition to the description of the land, a statement of the stock certificate number in the Portneuf-Marsh Valley Canal Company, and numbers of shares of stock represented.

It will be particularly noted in all the contracts between the Portneuf-Marsh Valley Irrigation Company, the construction company, and the petitioner herein, that all of the issued stock of the canal company was to be made liable for assessments to maintain and operate the system. The only execption was stock which was issued to the Portneuf-Marsh Valley Irrigation Company *and not made appurtenant to land*. In other words, all stock was subject to maintenance assessments and operating assessments which had at any time been transferred to a settler or contracted for by a settler and made appurtenant to land even though it subsequently became the stock of the Portneuf-Marsh Valley Irrigation Company. Stock, however, which had never been sold by the Portneuf-Marsh Valley Irrigation Company

to a settler, and which though issued to it, had not actually been made appurtenant to land, was not to be assessed for the maintenance of the system. The fact that no water was being used upon land to which water stock had been made appurtenant had no effect upon the liability of the stock for assessments, it being provided that whether water was used or not the stock should, nevertheless, be liable for its assessment.

A portion of the settlers paid up their contracts in full (R. 98) and from the record we can assume that the following table represents the stock of the Portneuf-Marsh Valley Canal Company as now outstanding and as affected by this action: (R. 300)

Held by Portneuf-Marsh Valley Irrigation Company, issued but not appurtenant to land, ... 1760 shares;

Issued and made appurtenant to land, ... 12,240 shares

Of the amount which has been issued and made appurtenant to land, 5,495.2 shares were regularly assessed for maintenance in the various years from 1918 down to the time of this action; failed to pay the assessments levied, and under proper proceedings were offered for sale for nonpayment of assessments and bid in by the company, Portneuf-Marsh Valley Canal Company. The company now holds this stock, with the right on the part of the original owner of the land, or his successor in interest, to redeem them upon paying the amounts assessed against the stock, with interest.

The 5,495.2 shares of stock is the stock referred to in paragraph six of the decree of the lower court. (R. 337-339)

As to all of the stock just mentioned, it will appear from the contracts of the settlers and also from a stipulation in the record, that the same was issued to or contracted to be issued to the various settlers at the time of the opening of the land for entry in 1908. (R. 95) It will be noted, therefore, that all this stock was contracted to settlers prior to the time that the trust deed was executed by the Portneuf-Marsh Valley Irrigation Company to the predecessors in interest of the respondents herein

The issue thus presents itself from this rather involved record in the language of counsel for the trustees in the cause before the court in the District of Idaho, in the following language:

> *"The only controverted issue presented for decision in this case is the relative priority of the lien of the Portneuf-Marsh Valley Irrigation Company, Limited, (the construction company) for the purchase price of its water rights as against the lien of the Portneuf-Marsh Valley Canal Company, Limited, a Carey Act settlers' operating company, by reason of assessments for maintenance."* (R. 298)

The foregoing statement of the issue is taken from the opinion of the Honorable F. S. Dietrich, District Judge, he having stated the issue in the language employed by counsel for the trustees, the rspond-

ents here. Without doubt the issue is correctly defined and it eliminates from the case at the outset any question of rights which the trustees might have superior to the rights which, in the absence of the trust deed, could have been asserted by the Portneuf-Marsh Valley Irrigation Company itself.

Before proceeding with the argument, there is one further fact which should be before the court which has assumed some importance in the decision of both the courts heretofore called upon to pass upon the case.

Section 3019 of the Idaho Compiled Statutes provides as follows:

> "§3019. *Lien for purchase price of water right.* Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired."

SPECIFICATION OF ERRORS TO BE URGED

The petitioner will urge upon this court that the Circuit Court of Appeals for the Ninth Circuit erred in holding, first, that the Carey Act (Act of Congress of Aug. 18th, 1894, 28 Stat. at Large, 372-422) "and acts amendatory thereof" creates a lien of any character whatever; second, in holding that the lien which the petitioner here seeks to enforce for unpaid water assessments is a lien "created by the owner and possessor of the land" within the meaning of Section 3019 of the Idaho Compiled Statutes; and third, that a stockholder in a corporation can assign his stock so as to free it from the obligation of paying all assessments lawfully levied against it by the corporation.

SUMMARY OF THE ARGUMENT.

The lien asserted by the petitioner here and the lien asserted by the trustees who are respondents here are based alike upon the contracts between the parties interested in the Portneuf-Marsh Valley Irrigation project, and are not dependent in any sense upon either Federal or State legislation.

The lien of the trustees for the unpaid balance on the water contracts of the settlers is a lien by way of mortgage and pledge executed by the settlers to the construction company, to the rights of which company the trustees have succeeded.

The mortgages given by the settlers to the construction company and the pledge of the stock by the settlers to the construction company can be foreclosed by the trustees under their trust deed but only subject to the burdens which the property mortgaged and the stock bore in the hands of the original settler.

One of the burdens subject to which the mortgages and pledges were given and taken was the burden of paying assessments on the water stock in the petitioner company or, in the ultimate, the burden of maintaining and of operating the irrigation system.

ARGUMENT.

The issue involves the priority of liens. We have heretofore quoted in this brief the issue as defined by counsel for the trustees, who are respondents here, and we desire again to quote that portion of the record. (R. 298)

> *"The only controverted issue presented for decision in this case is the relative priority of the lien of the Portneuf-Marsh Valley Irrigation Company, Ltd., (the construction company) for the purchase price of its water rights as against the lien of the Portneuf-Marsh Valley Canal Company, Ltd., a Carey Act settlers' operating company, by reason of assessments for maintenance."*

The foregoing quotation clearly defines the two liens concerning the priority of which the cause has reached this court. It will be noted that no claim is made on behalf of the trustees which could not have been asserted by the Portneuf-Marsh Valley Irrigation Company, Ltd., (the construction company) if the contracts with the settlers had not been hypothecated. In other words, the issue is between the construction company and the operating company.

The lien of the construction company is for the purchase price of its water rights. There are three sources from which it can be asserted. This lien derives its existence from, *first*, Congressional legislation, namely, the Carey Act; *second*, legislation of the State of Idaho; and, *third*, the contracts between the construction company on the one hand and the State of Idaho on the other, and between the con-

struction company on the one hand and the operating company on the other, and between the construction company on the one hand and the settlers on the other.

As to the first of these three sources, we submit it to this Honorable Court that the Carey Act in and of itself does not create any lien; does not define any lien; and does not limit the right to a lien. The Carey Act is an enabling act only. The Federal legislation which has to do therewith is the Act of June 11th, 1896, Chapter 420, Section 1, (29 Stat. at Large, 413). The language of the act is as follows:

> "A lien, or liens, is hereby authorized to be created by the state in which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers."

The Circuit Court of Appeals of the Ninth Circuit, in the case of Equitable Trust Company of New York against Cassia County, and others, 5 Fed. (2nd) 955, on May 25th, 1925, held as follows, in referring to the Carey Act:

> "There seems to be some contention that the reclamation lien finds support or sanction in the laws of the United States, but such is not the case. The Act of Congress referred to is simply an enabling act. The states were power-

> less to create liens on public lands until the title had passed from the general government, or at least until the title had been earned, without the consent of the United States, and the Act of Congress was passed for the purpose of removing this restriction on the powers of the states. The act does not attempt to do more. It creates no lien, and denies no power to the states after the title has passed from the general government; and, considering the question as one of local law only, the Supreme Court of the State of Idaho has held that the tax lien is superior and prior to the reclamation lien.—Continental & Commercial Trust & Savings Bank v. Werner, 36 Ida. 602.

The decision of the Supreme Court of Idaho which is referred to in the foregoing opinion finds its support upon the same construction of the Carey Act, namely, that it authorized the states, and no other authority, to *create and define* the liens therein referred to.

We pass from this branch of the case, therefore, assuming the position that the lien which the respondents here claim must rest for its validity upon some other authority than is to be found in the Carey Act.

The second source from which the lien asserted by the respondents here could have been created and defined, is, as stated above, the statutes of Idaho.

The legislature of Idaho has performed the ceremony of accepting the conditions of the Carey Act.

(Laws of 1895, page 219; Laws of 1899, page 284; Laws of 1919, page 67; Idaho Compiled Statutes, Sec. 2996). Whatever may have been the necessity for this ceremony, it is apparent that in so far as it affects the character of lien here under discussion, nothing was added to the Congressional legislation on the subject.

During all the time involved in the present controversy, Section 3019 of the Idaho Compiled Statutes has been in effect, and its provisions are as follows:

> "§ 3019. Lien for purchase price of water right. Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired."

It is apparent that the statutes of the State of Idaho do not assume to go farther than to confirm the right to a lien on the part of the builders of the irrigation system. Something further is necessary than the legislation of Idaho when a lien is sought to be enforced in any specific case. The contract, or

contracts, under which the work is undertaken and prosecuted must in all cases be the ultimate ground upon which the lien must rest and upon which it must be defined. In the instant case, therefore, as counsel for petitioner view the matter, it is necessary for us to examine the third source referred to above as the final basis upon which this case must rest.

The contract between the promoters of this project and the State of Idaho was entered into on June 3rd, 1908. (R. 250-267) Section 7 of the contract (R. 257) provides for the sale by the State to settlers of lands within the project. Section 8 (R. 257-259) provides the price and terms of payment of water rights sold to settlers.

The form of contract which the construction company, the Portneuf-Marsh Valley Irrigation Company, used in making sales of water to settlers appears in the record as plaintiff's exhibit "C-1" (R. 125-131). This contract, when read in connection with Section 3019 of the Idaho Compiled Statutes, is material for the purposes of determining what lien, if any, existed in favor of the construction company. In the last paragraph on page 129 of the record, the form of security which the settler pledged himself to give is set forth. Unless we have entirely failed to sense the meaning and purpose of these various contracts, the settler agreed to secure all payments with a mortgage upon the land and the water which was appurtenant thereto. It follows, of course, that such a mortgage would be governed by

the laws of Idaho. In paragraph 5, on page 130 of the record, the settler also agreed to assign his water stock certificate in the operating company to the construction company and authorized the construction company to pledge this stock certificate.

The foregoing statement, without further embellishment, we believe, supplies every necessary element for the determination of the form of lien which the construction company claims.

As has been heretofore set forth in the statement of facts herein, the original contract between the promoters and the State of Idaho made provision for the orderly transfer of title to the irrigation system and appurtenant water rights to the settlers by means of an operating company. The contract of the promoters with the State of Idaho obligated the promoters themselves to cause this operating company to be incorporated. The record here shows that the company was incorporated and that the methods of its functioning were in effect a part of the original contract between the promoters and the State of Idaho.

The sale of water rights by contract, or otherwise, had the effect of dedicating the water to the land to which it was to be applied. We find this clause in the contract between the promoters and the State of Idaho on page 262 of the record:

> "The sale or contract of water rights to a purchaser shall be a dedication of the water to the

land to which the same is to be applied, and the water right so dedicated shall be a part of and shall relate to the water right belonging to the said system of canal."

In incorporating the operating company, with the situation as hereinbefore set forth in the minds of all the parties, it was provided that the operating company could levy assessments for the purpose of carrying on, maintaining, managing, and operating the irrigation system. (R. 275-276) In the By-Laws of the operating company (R. Sec. 5, p. 285) it was provided that all stock issued and made appurtenant to land should be subject to assessment for the foregoing purposes. As heretofore pointed out, the only exception was stock "held for the benefit or in the interest of the Portneuf-Marsh Valley Irrigation Company, *and which has not been sold or made appurtenant to land.*"

In so far as the specific lien of the construction company is concerned, in the light of the foregoing provisions of the contracts between the parties, when we consider the method of its enforcement, it will readily apear what its limitations are. The water itself having been made appurtenant to land, and the land having been mortgaged as security to the construction company, the construction company held both the land and the water as security. Upon any default on the part of the individual contract holder, the construction company had the right to foreclose its mortgage on the water and the land. If it foreclosed its mortgage and obtained title to the water

and the land through that means, then it stepped into the shoes of the individual settler who had previously owned it. The water having been theretofore made appurtenant to land, then the stock in the operating company which represented that water remained subject to assessment regardless of who might own the stock. The fact that the construction company obtained title to the land and water through foreclosure proceedings against the original contract holder did not create any different situation than if the original contract holder had conveyed his land and water to some other individual. One of the burdens attached to the ownership of land and water under this particular irrigation system was the burden of paying a proportionate share of the cost of maintaining and operating the system which delivered the water. That obligation followed the land and the water regardless of who owned it. These deductions, it seems to us, follow naturally from the situation, and do not lead to any conflict whatever between the sections of the statutes of the State of Idaho confirming the right to a lien for the unpaid balance on water contracts and the general right of such a corporation as the petitioner here to maintain itself and to preserve its properties by levying assessments on its stockholders.

The test of any theory is its practical operation. That the foregoing theory is the only logical solution of the situation here, we think will be apparent from a consideration of its effect when applied.

Let it be assumed that at the inception of this par-

ticular project there were fifty farmers who purchased land and water with the idea of reclaiming the land and building a home. Each purchaser of water presumably entered into his contract with a knowledge and understanding of the methods by which the system was to be constructed and turned over to the settlers themselves. Each purchaser bought his land and his water with the understanding that the irrigation system would be operated and would be maintained. Each purchaser knew that the operating company had no means of raising revenues for the preservation and the maintenance of the irrigation system other than by assessing the stockholders in the operating company, and each purchaser of stock knew that the stockholders of the operating company were the settlers themselves, each one interested in proportion to the amount of his purchase. Naturally, each purchaser of water knew that the system would be maintained only by assessments against himself and all the other settlers. The natural query for such an entryman to make at the time of his purchase would be, "If I make all my payments but the other forty-nine settlers fail to make theirs, is the stock in the operating company still subject to assessment or can the construction company forfeit the contracts of the other forty-nine settlers and leave the stock which I hold as the only stock which is subject to assessment? and if such a situation can result, will it follow that the entire burden of maintaining and operating this entire irrigation system will fall upon me as the only stockholder whose stock remains subject to assess-

ment?" The foregoing is the natural question to be asked of the promoters of this project by the intelligent entryman. The answer of the promoters is just as logical from this record. The answer of the promoters would be in the language of Section 5 of Article 5 of the By-Laws of the operating company, appearing on page 285 of the record. The promoters would inform such a doubtful entryman that he need have no fear upon that subject for the reason that just as soon as water was sold to an entryman it became appurtenant to the land to which it was to be applied, and that, regardless of who owned the land and the water, the stock representing that water would remain subject to assessment.

There does not appear anywhere in the contracts of the parties involved in this litigation a provision to the effect that land once sold could be forfeited to the construction company; that water once sold and made appurtenant to land could be forfeited to the construction company; that water stock once issued for water made appurtenant to land could be forfeited to the construction company. The rights of the construction company against all contract holders violating their contracts were limited to foreclosure upon the land and water itself. In short, the construction company retained the right, upon nonpayment of the moneys due it, to proceed against the contract holder and take his title away, and place it in the construction company, subject to the right to sell it to a new settler but still charged with all the burdens which it bore when in the hands of the original purchaser.

The character of the lien of the trustees is further defined by the manner in which they are in a position to enforce it. If a contract holder defaults in the payments due on his contract, the following remedies become open to the trustees:

First: Under the provisions of paragraph four of the settler's contract, the trustees may foreclose the mortgage which the settler gave, and they may also foreclose the pledge of the stock in the Portneuf-Marsh Valley Canal Company, which the settler has authorized. (R. 129-130)

Second: Indirect coercion may be availed of and the water called for in the contract of the settler may be shut off until the settler has made his payments. (Section 6 of the contract, R. 130).

The foregoing two remedies are provided by the original contracts entered into in 1908 and the same remedies are provided in the 1915 contracts. (R. 135). The foregoing analysis of the rights of the respective parties has, of course, been made from the record of their contracts. It follows that, as counsel for the petitioner view the case, the Court is not called upon to construe Section 3019 of the Idaho Compiled Statutes.

The assertion at the outset of this litigation by the trustees, who are respondents here, that

> *"the only controverted issue presented for decision in this case is the relative priority of the*

lien of the Portneuf-Marsh Valley Irrigation Company, Limited, (the construction company) for the purchase price of its water rights as against the lien of the Portneuf-Marsh Valley Canal Company, Limited, a Carey Act settlers' operating company, by reason of assessments for maintenance",

serves no purpose other than to emphasize the unquestioned priority of the assessments for maintenance. The lien of the Portneuf-Marsh Valley Irrigation Company (the construction company) is a lien based upon contract by which, as security for the unpaid purchase price of its water rights, the Portneuf-Marsh Valley Irrigation Company obtained, first, a mortgage; second, a pledge of stock. On foreclosure of that mortgage and that pledge of stock, the Portneuf-Marsh Valley Irrigation Company, if it were the purchaser on foreclosure sale, stepped into the shoes of its mortgagor and its pledgor. It could obtain by foreclosure no greater rights than its mortgagor and pledgor had. Its mortgagor and pledgor held the property at all times subject to the burden of paying the assessments levied against the stock. If the theory of the trustees here is sound, and at the sale of the pledged stock in the Portneuf-Marsh Valley Canal Company, some indivdual was purchaser, as the law contemplates he might be, then that individual would become a stockholder in the Portneuf-Marsh Valley Canal Company, freed of the burden of paying assessments on his stock to maintain the system which the canal company had owned. If the pledgee of the stock, in the absence of other bidders, purchased

the stock at the foreclosure sale itself, it would assume no different position than would any other purchaser, and it would then become a stockholder in the Portneuf-Marsh Valley Canal Company and would hold the stock subject to the same burdens as the pledgor.

It has been conceded throughout the proceedings here that the trustees have no greater rights in the premises than the construction company itself would have had the trust deed not been delivered. It is possible that an explanation should be made of this situation in the light of the argument which has just been made.

At the time that the trust deed for the foreclosure of which this action was brought was executed and delivered, namely: October 16th, 1909 (R. 53) (the date to which we refer is the date of acknowledgement) the Portneuf-Marsh Valley Canal Company, the petitioner here, had already been formed and the form of stock certificates to be issued had been prepared and were included in the contracts with the various settlers on the tract. The land had been opened to entry and all the contracts which are here involved had been entered into. (This latter statement is borne out by the stipulation of counsel appearing at page 95 of the record, wherein it was agreed that all of the stock of the canal company which is the subject of this litigation, or which was in the hands of the trustees had been, by the Portneuf-Marsh Valley Irrigation Company, sold

under contract to the various land owners under the project, and the water rights, or the stock made appurtenant to the several tracts of land described in the contract at the time of sale.) The conveyance from the Portneuf-Marsh Valley Irrigation Company to the Portneuf-Marsh Valley Canal Company of the irrigation system and appurtenant water works had not actually been made. Strictly speaking, it is probably true that the Portneuf-Marsh Valley Canal Company issued its stock to the order of the Portneuf-Marsh Valley Irrigation Company without consideration until it actually received the conveyance of the irrigation system and appurtenant water works. However this may be, the fact remains that at the time the trust deed was executed, all the land here involved had been sold to settlers on contract. Title to the irrigation system and appurtenant water works remained in the construction company, the Portneuf-Marsh Valley Irrigation Company, but that title was of course subject to the contractual obligations which the Portneuf-Marsh Valley Irrigation Company had assumed to the various settlers and to the State of Idaho to transfer the system and appurtenant rights to the operating company, the Portneuf-Marsh Valley Canal Company, the petitioner here. In the light of this situation, when the trust deed was given, it was, of course, necessary that all the rights of the Portneuf-Marsh Valley Irrigation Company should be included therein. Legal title to the irrigation system and appurtenant water rights remained in the Portneuf-Marsh Valley Irrigation Company, and, consequently was included in

the trust deed. The Portneuf-Marsh Valley Irrigation Company had certain contracts with the settlers; consequently, these contracts were pledged as security in the trust deed; the Portneuf-Marsh Valley Irrigation Company, with each contract which it delivered in accordance with the terms of the various contracts appearing in the record, was also delivering stock in the Portneuf-Marsh Valley Canal Company to the purchaser, and, consequently, the trust deed provided for the pledge of the stock.

When the time came to foreclose the trust deed, the trustees foreclosed on everything which the trust deed covered and thereby the trustees sought to step into the position of the Portneuf-Marsh Valley Irrigation Company. More than this, of course, they could not do. The decree of foreclosure appearing on page 315 of the record authorizes a foreclosure on the irrigation system and appurtenant rights which, of course, under the trust deed, was proper, but the decree does not go further than to authorize foreclosure and sale in accordance with the pre-existing obligations of the Portneuf-Marsh Valley Irrigation Company to transfer the irrigation system to the Portneuf-Marsh Valley Canal Company.

It is for these reasons that the trustees themselves defined the issue as heretofore set forth in this brief, namely: that the issue was as between the Portneuf-Marsh Valley Irrigation Company, (the construction company) on the one hand, and the Portneuf-Marsh Valley Canal Company, (the operating

company,) on the other. It is for these reasons that the trustees have not acquired, and can not now assert, any greater rights, nor any different rights, than the construction company, that is, the Portneuf-Marsh Valley Irrigation Company, could assert, if the trust deed had not been given.

It is respectfully submitted that the decree of the District Court of the United States, for the District of Idaho, and particularly paragraph six thereof, is correct, and that the cause should be, by this Court, remanded with instructions to affirm the decree originally entered herein by the District Court in Idaho.

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